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**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

In Re the Dependency of P.P.T., J.J.I., O.L.T., minor children,

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant,

v.

PETER TSIMBALYUK,

Respondent.

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I. INTRODUCTION

Rather than addressing the important legal issues raised in this appeal – namely the court’s disregard of the evidence and its unspoken expectation that evidence of alternatives be presented even when there was no alternative action pending and no advocacy for any alternative – the father selects testimony out of context and mischaracterizes the evidence. A review of the record as a whole shows clearly that neither Dr. Borton nor the CASA nor any other witness testified that dependency guardianship, third party custody, long term foster care or an on-going dependency would serve these children’s best interest, and no witness testified that the benefits of visitation were sufficiently compelling to deny termination. In fact, the witnesses testified quite the opposite.

Also contrary to the father’s assertions, the state’s CR 60 motion was not brought to obtain a “second bite at the apple” and its appeal of the CR 60 ruling was not an attempt to collaterally attack the underlying termination order. Rather, the CR 60 motion was brought to allow the trial court to correct its mistakes and assumptions about extraneous issues, and since the Department and CASA timely appealed the underlying order on termination it had no need to appeal the CR 60 order to also challenge the court’s ruling on termination. Finally, the state is not arguing that guardianships or third party custody actions are inherently temporary; or

that the court should have rubberstamped the Department's request for termination so that the state could save money; or that the state should be excused from proving the last two elements of the termination statute. These are misrepresentations of the state's position that are simply strawman arguments erected by the father so he can easily knock them down.

The Department recognizes and honors its legal obligation to establish by the requisite proof each and every element that is legally required for termination. It simply objects to the court changing the rules post trial to insist on proof not legally required; making assumptions not supported by the evidence; refusing to consider evidence that demonstrates it was mistaken in its assumptions; and ultimately denying these children their statutory and constitutional right to permanency. The state also objects to the trial court's insistence that the remedy for correcting the court's errors is to file another termination petition. That is an illusory remedy that does not serve the children's best interest.

II. ARGUMENT

A. Neither the CASA's nor Dr. Borton's testimony supports the court's ruling that viable alternatives to termination currently exist or that the benefit of on-going contact outweigh the need for termination

The father relies solely on the testimony of Dr. Borton and the

CASA to argue that the court's denial of termination was supported by substantial evidence. But the father takes selective comments out of context and grossly mischaracterizes the evidence. Neither Dr. Borton nor the CASA testified that they currently favor a dependency guardianship over termination, and neither testified that the positive nature of the father's visitation was a sufficiently compelling reason to keep the father's parental rights in tact. The CASA was especially adamant that termination was the only resolution that would provide these children permanency and serve their best interest.

She had been the CASA for two years and spent hundreds of hours investigating the case. 6RP 794, 800, 7RP 873. Although she considered alternatives to termination and would have been open to them for P.P.T. earlier in the case, those alternatives were no longer viable at the time of trial. 7RP 878, 879, 880. The grandmother, with whom P.P.T. lived, wanted to adopt him and P.P.T. knew this. 7RP 857, 866. With respect to the younger children, the only alternative to which the relatives would agree was adoption, and that had been their position since the children were placed with them, so there was no feasible alternative for the younger children. 7RP 877. This evidence was uncontested and it foreclosed any alternative to termination since the relatives had to agree to any alternative resolution that would have kept the children placed with

that family. The CASA also worried about the passage of time, the instability the children had already had in their placements, and the need to provide them with secure homes. J.J.I. was especially vulnerable and could neither wait any longer for a permanent home, nor risk another move. 6RP 849, 850, 7RP 891. He had already been moved eight times and was fragile. 7RP 887, 891. All of the children needed clarity with respect to who would parent them. 7RP 876. Despite the father's positive interaction with the children during his few hours of supervised visitation, he was still incapable of caring for the children; he did not understand their developmental needs; he could not meet their emotional or mental health needs; he could not protect them; and the CASA believed his situation had not changed since 2006. 7RP 869, 873, 874. She testified that continuing the relationship with the father even six more months would not be in the children's best interest and would diminish their prospects for integration into a stable and permanent home. 7RP 874. She believed the children would be harmed if the court did not terminate because it would interfere with the relatives ability to parent the children successfully. 7RP 881.

The father cites one answer given by the CASA to erroneously claim that the CASA did not support termination. Father's Brf. at 31. The only testimony he cites is that which is underlined below:

Q. And are the three boys close to each other?

A. Yes. [J.J.I. and P.P.T.] especially.

Q. If parental rights are terminated, do you have—do you think that the family will continue to allow some contact with Peter, Sr.?

A. Oh, yes. Yes.

Q. And is that ongoing contact, do you think, appropriate for the boys?

A. Yes.

Q. And in their best interest?

A. Yes. I think [P.P.T.] especially has a bond with his father and – but I think for all boys to have contact with their father is a good thing.

Q. And is that separate in your mind from having a legal relationship with Mr. Tsimbalyuk?

A. Yes. Yes.

7RP 869.

The father claims that this indicates the CASA disagreed with termination, but one only needs to consider her answer to the questions before and after the one quoted by the father to see that while the CASA believed ongoing contact was appropriate, she believed the extended family would allow contact after termination, and she believed the positive bond the children had with their father was an issue separate from whether the legal relationship with the father should continue. 7RP 869. Looking at the CASA's testimony as a whole, it is clear that she believed termination was imperative regardless of how positive visitation was. 6RP 849, 850, 7RP 857, 866, 869, 873, 874, 876, 877, 878, 879, 880, 881, 887, 891. The social worker agreed and further testified to her observations of

the father's behavior during visitation. She testified that the father brought food and was attentive to the children's physical needs, but he lacked the ability to engage them in activities and stimulate them. 2RP 358, 359. He would frequently talk to the social worker instead of interact with the children. 2RP 359.

The father also relies on Dr. Borton's testimony to argue that the court was correct in ruling that a guardianship would better serve these children's best interest than would termination. Father's Brf. at 30. But this post hoc rationalization for the court's ruling is disingenuous coming from the father who neither filed a guardianship petition nor argued for guardianship as an alternative below. Additionally, Dr. Borton's evaluation of the father occurred a year and a half prior to trial; the father had been separated from the mother for months at the time of the evaluation with no plans to reunite with her; and the relatives who had the children at the time and who Dr. Borton thought might be open to a guardianship were not the same relatives who had the children at the time of termination. 3RP 381, 383, 396, 425, 435. Dr. Borton testified that at the time he wrote his report, he did not think termination made sense because he felt there were other options at the time that would allow the father some contact with the children, but he acknowledged that circumstances had changed since he wrote his evaluation. 3RP 424.

Dr. Borton was absolutely concerned to learn that the father not only reunited with the mother but married her and was living with her at the time of trial. 3RP 426. That judgment was, in Dr. Borton's opinion, very dangerous for the children as was the father's decision to quit counseling. 3RP 425, 431. Dr. Borton admitted that the relatives who had the children at the time he wrote his evaluation seemed willing to allow the father to play the role of 'visiting' parent, and that would have been good for the children if it happened at the time. 3RP 431-432. Now however, the tables had turned. 3RP 432. Dr. Borton did not believe the father could be a full time parent for the children and he did not believe the father should have even frequent visitation with them. 3RP 432, 465. There were simply too many instances of bad judgment, deception, and lack of knowledge about the children's needs. 3RP 432. Also Dr. Borton could not speak about the current relative care providers or their relationship with the father, or how they felt about visitation, and he acknowledged he was not an expert on the different kinds of permanent plans that were available. 3RP 435, 450, 465-66. He agreed that a guardianship might present a tough situation for the family. 3RP 440, 450. It would impact the relative's relationship with the father, cause a confusion of roles, and pressure loyalties and alliances within the family. 3RP 440. He agreed that permanency is important to children and that instability is detrimental,

and when the state tried to elicit testimony from Dr. Borton as to whether the children's need for permanency outweighed the benefits of on-going contact with the father, the court sustained an objection by the father's attorney and refused to allow Dr. Borton to answer. 3RP 439. Ultimately, Dr. Borton did not testify one way or another about whether termination was currently appropriate.¹

Viewing the evidence as a whole, no fair minded person would interpret either Dr. Borton's testimony or the CASA's testimony as currently supporting guardianship over termination. *In re Welfare of H.S.*, 94 Wn. App. 511, 519, 973 P.2d 474 (1999)(court reviews sufficiency challenges by looking at the record as a whole); *In re the Marriage of Hall*, 103 Wn. 2d 236, 246, 692 P.2d 175 (1984)(substantial evidence is that quantity of evidence sufficient to persuade a fair-minded person of the truth of the stated premise). The father may have been bonded to his children and he may have been capable of engaging with them for a few hours of supervised visitation, but that was all he was capable of doing and it was hardly enough to justify denying these children a permanent home. *In re A.V.D.*, 62 Wn. App. 562, 815 P. 2d 277 (1991)(evidence supported

¹ Thus the father's interpretation of the court's Finding of Fact 1.17 and his implication that Dr. Borton testified against termination is incorrect.

termination notwithstanding finding that continued contact was in child's best interest)

B. The CASA should be permitted to appeal the order denying termination as a matter of right, and even if neither the state nor the CASA have a right to appeal the underlying order, this court should nonetheless accept discretionary review pursuant to RAP 2.3(b)(1)(2) and/or (3).

The father concedes that the order denying the Department's CR 60 motion is appealable as a matter of right but complains that the Department and CASA "act as if the denial of termination is appealable as of right simply by virtue of the fact that the denial of CR 60(b) motion is appealable." Father's Brf. at 24, and *see* RAP 2.2(a)(10). But the Department relied on Commissioner Verellen's order of July 6, 2009 that consolidated the two orders for appeal, and held:

It appears that the rulings by the trial court are appealable as a matter of right under RAP 2.2(a).

The father did not seek to modify or otherwise challenge that order of the court, even though his attorney was provided notice of that ruling. RAP 17.7 (a person may object to a ruling of a commissioner only by way of a motion to modify served and filed within 30 days.).

Additionally, the case law thus far has only addressed the question of whether the state has a right to appeal an order denying termination. *In re the Dependency of A.G.*, 127 Wn. App. 801, 112 P.3d 588 (2005),

rev. denied, 156 Wn.2d 1013 (2006)(state has no right to appeal an order denying termination). While the state may not have the right to appeal such an order, the same cannot be said for the CASA, whose duty it is to represent the interests of the children, and whose rights and obligations are independent of the state. See RCW 13.34.105(1)(a)-(f)(role is to investigate and make independent recommendations, and to advocate for the best interest of the child); GALR 4(h)(3)(rights and powers include right to introduce exhibits, examine witnesses, and appeal orders in RCW 13.34 cases); *In re the Welfare of B.D.F.*, 126 Wn. App. 562, 109 P.3d 464 (2005)(GAL for children have roles and rights to act on behalf of children that are independent of the Department).

As the representative for the children, the CASA is uniquely situated to advocate for the one party whose interests are paramount to all others. See e.g., *In re Allen*, 139 Wash. 130, 245 P.2d 919 (1926); *In the Matter of Day*, 189 Wash. 368, 65 P.2d 1049 (1937); *Russell v. Catholic Charities*, 70 Wn.2d 451, 423 P.2d 640 (1967); *In re the Matter of the Adoption of Lybbert*, 75 Wn.2d 671, 453 P.2d 650 (1969). In any conflict between a parent's rights and a children's welfare, the parent's rights must be subordinate to the children's. *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). Since the children's rights are more compelling and more highly protected than the parent's, a significant

equal protection question arises if parents are allowed to appeal orders that are unfavorable to them, but children are not.²

The right of a child to have permanency and be legally freed for adoption is a substantial one. The court should not apply a narrow interpretation of the rules of appellate procedure to prevent a meritorious appeal when a case involves the substantial rights of children. *See e.g., Guardianship of Ivarsson*, 60 Wn.2d 733, 738 (1962) (allowing an appeal by a “next friend” on behalf of a minor ward in a guardianship proceeding stating the court should not apply ordinary rules of civil procedure to prevent meritorious appeals involving the rights and property of minors and incompetents). The Rules of Appellate Procedure are to be interpreted “to promote justice and facilitate the decision of cases on the merits.” *Dependency of E.L.F.*, 117 Wn. App. 241, 244, 70 P.3d 163 (2003) (citing RAP 1.2(a)).

Despite the father’s attempt to analogize the facts of *In re Dependency of A.G.* to the facts of this case, the court never reached the merits of the case in *A.G.* Instead the court held there was no right for the *state* to appeal an order denying termination, and denied review because the *state* could file another termination petition and the practical

² The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1 sec. 12 mandate that persons similarly situated under the law receive similar treatment. *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *In re the Interest of Skinner*, 97 Wn. App. 108, 982 P.2d 670 (1999).

effect was simply to give the mother more time to “get it together.” *In re the Dependency of A.G.*, 127 Wn. App. 801, 112 P.3d 588 (2005), *rev. denied*, 156 Wn.2d 1013 (2006). But in this case, the court below did not deny termination because it wanted to give the father more time to correct his deficiencies. The court denied termination because it believed some custody arrangement, other than adoption, should be arranged with the relatives. In this case, the filing of another termination petition will not cure the errors made by the trial court and it will not restore the uncertainty and loss of permanency the children have already suffered. *See infra* at 16-17. Even if the *state* can file another termination petition, this is not a realistic remedy for the CASA. Thus, the CASA should be allowed to appeal the order denying termination as a matter of right, even if the state cannot.

1. This court should accept review pursuant to RAP 2.3(b)(1)and/or(2).

The Department and the CASA’s opening briefs in this case establish why this case satisfies the criteria for discretionary review. By denying termination based on consideration of theoretical alternatives that were not pending before the court, the court committed obvious or probable error because its ruling is not supported by substantial evidence and it conflicts with every published case establishing that the state need

not prove less restrictive alternatives were unavailable in order to terminate parental rights.

As pointed out in its opening brief at 19-21, the past decade of case law in Washington establishes that when faced solely with a petition for termination, the court is not to concern itself with whether theoretical alternatives to termination exist. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 976 P.2d 113 (1999); *In re Welfare of M.R.H. and J.D.F.*, 145 Wn. App. 10, 188 P.3d 510 (Div. III 2008), *rev. denied*, 165 Wn.2d 1009 (2008), *cert. denied* 129 S. Ct. 1682 (2009); *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 158 P.3d 1251 (Div. I 2007); *In re the Welfare of C.B.*, 134 Wn. App. 336, 139 P.3d 1119 (Div. II 2006); *In re Dependency of I.J.S.*, 128 Wn. App. 108, 114 P.3d 1215 (Div. I 2005), *rev. denied*, 155 Wn.2d 1021(2005).

In dispensing with this long line of cases, the father argues that even though the court is not required to consider alternatives to termination, it is not prohibited from doing so. Father's Brf. at 32. His sole authority for that proposition is the trial court's conclusion of law in this case. *Id.*, citing Challenged Conclusion of Law 2.3. But the trial court's belief as to what the law should allow does not make it so, and its conclusion of law in this case carries no presumption of correctness. *In re Welfare of A.T.*, 109 Wn. App. 709, 34 P.3d 1246(2001). If trial courts

hearing termination cases are not *required* to consider alternatives, then the state is not *obliged* to present evidence of alternatives, and should not be faulted for failing to do so.

Even if we assume, for sake of argument, that the court can choose to consider alternatives to termination without an alternative petition before it, basic notions of fairness require the court to give the Department notice that it wishes to consider alternatives and an opportunity for the Department to present evidence on those alternatives. *In re Dependency of R.H.*, 129 Wn. App. 83, 117 P.3d 1179 (2005)(court reversed dismissal of a dependency where the Department had no notice and no legal reason to present evidence or argument related to dismissal at a shelter care hearing). The court in *R.H.* reiterated what has been clearly stated before: “giving interested parties a meaningful opportunity to present evidence coincides with the best interests of the child.” 129 Wn. App. at 83, citing *In re Dependency of R.L.*, 123 Wn. App. 215, 223, 98 P. 3d 75 (2004). That basic fairness was not afforded to the state or the CASA in this case, where the court had an unspoken expectation of evidence it wanted presented, but did not articulate that expectation until it issued its ruling denying termination. When the state and the CASA requested the chance to present the evidence the court found lacking, the court’s essential response was “too late.” The court below and the father on appeal surmise

the state was simply surprised that it lost, but the surprise was not that Judge Kessler might deny termination, the surprise was that he would deny termination based on evidence not presented or legally required, on issues not properly before him. This was fundamentally unfair and contrary to the children's best interest. As the court in *K.S.C.* noted:

[T]he State correctly points out that approval of a permanent placement was not before the trial court in the termination proceeding...The statute does not indicate that the State must seek approval of a permanent placement at the time of termination. RCW 13.34.180(6) refers to the parent-child relationship diminishing the child's "prospects" of a stable and permanent home, not to certainty of such placement....Nothing in the termination statutes directs a court to consider a dependency guardianship as an alternative to termination. Instead, when faced solely with a petition for termination of parental rights, the court's inquiry is whether the allegations in RCW 13.34.180 are proved by clear, cogent and convincing evidence.

In re Dependency of K.S.C., 137 Wn.2d 918, 928-30, 976 P.2d 113 (1999).

The rationale underlying *K.S.C.* and the cases that followed is a common sense requirement that if a parent is truly interested in an alternative to termination – they will file whatever alternative action they deem appropriate so it can be fully examined and the court can fairly determine whether it or termination better serves the children's best interest. If the parent does not initiate any alternative action, it is

presumed that the only alternative the parent wants is a return home. No case better illustrates that point than this one. The father never advocated for any alternative other than return of the children to him at trial, or in the months following trial despite the court's encouragement that someone file a guardianship petition – yet on appeal he defends the court's conclusion that such an alternative exists. This allows him to sit on the fence with his parental rights fully intact, arguing that theoretical alternatives exist without committing to any one of those alternatives, and all the while his children languish in foster care. His only proposed solution is to suggest that the Department file another termination petition. But this is an illusory remedy given the months it will take for a new termination proceeding to get to trial; it affords the children no stability in the interim; it will not remedy the delay they have already suffered; and there is nothing to prevent the court from making the same factual and legal mistakes at the second trial. It also unfairly requires the Department to present evidence that it is not legally obligated to present, including forcing the relatives to testify, or risk the next judge hearing the second termination deciding that some other unspoken alternative should have been pursued. In short, it gives the father what every published case has thus far rejected – it imposes as a precondition to termination in every case

proof that there is no less restrictive alternative to termination available.

See supra at 13, and Department's opening brief at 19-21.

The suggested remedy of another termination trial also ignores the strain this puts on county and state resources, including the court. In this case, the trial court heard eight days of testimony, admitted 60 exhibits, and entered 38 Findings of Fact concerning this father and his children from 2007 to 2009. By suggesting that the Department need only file another termination petition, the trial court and the father overlook how this could potentially require a complete re-litigation of the entire case.³

In addition to improperly denying termination based solely on its assumption that alternatives to termination exist, the court also committed obvious or probable error in ruling that the relative caretakers should have been called to testify about their willingness to continue caring for the children in some alternative structure short of adoption. This interpretation of RCW 13.34.180(1)(f) conflicts with established case law holding that this statute focuses on whether the parents *legal* relationship impairs permanency for the child and not whether the child's particular placement

³ The doctrine of collateral estoppel applies only after the party has had a full opportunity to present his or her case. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992). A "full opportunity to present the case" must include the right to appellate review. Since orders denying termination are not considered final orders, subject to appeal by right, it is not clear what use a subsequent court might make of Judge Kessler's findings and conclusions in this case.

is permanent, or the nature of the personal relationships involved, or whether the children are going to be adopted. See Department's opening brief at 26-28; *In re A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004); *In re J.C.*, 130 Wn.2d 418, 427, 924 P.2d 21 (1996); *In re K.S.C.*, 137 Wn.2d 918, 976 P.2d 113 (1999); *In re A.V.D.*, 62 Wn. App. 562, 569, 815 P.2d 277 (1991); *In re Esgate*, 99 Wn.2d 210, 214, 660 P.2d 758 (1983); *In re D.A.*, 124 Wn. App. 644, 102 P.3d 847 (2004) *In re A.C.*, 123 Wn. App. 244, 98 P.3d 89 (2004); *In re T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001). There is no law requiring the current caretakers of dependent children to be hauled in to court at a termination trial and examined about what permanent plan they might be willing to agree to if they cannot adopt. Particularly where it appears the court only intends with that testimony to bully the relatives into agreeing to something less than adoption. Judge Kessler made that intention clear in his oral ruling by stating that he wanted the relatives to testify, but he would have doubts about their commitment to the children if they testified they would not continue caring for the children unless they were allowed to adopt. 7RP 999; *see also* Challenged Findings of Fact 1.26, 1.27, 1.28, 1.29, 1.30, 1.32, 1.33. This placed the relatives in an impossible position, and it is a position that should not be imposed on any relative or foster care provider. As the CASA explained:

"I believe it puts families in unreasonable conflict to require that relatives testify about what sort of custodial arrangement they would be willing to agree to, because it places them in a terrible position of being perceived as working against a family member, alienating the family, risking the children being taken away, or risking not being able to adopt. We ask enough of these incredible caregivers – to place their own lives on hold and make dramatic changes to their family structures and the ways they are raising their own biological children. They should not be required to force rifts in their families in order to nurture these young boys." CP 346.

The court also committed obvious or probable error in concluding that on-going dependency is sufficiently stable and permanent for these young children because that conclusion is not supported by any evidence, much less substantial evidence, and no published case has condoned indefinite foster care for children as young as 2, 4, and 10. *See* Department's opening brf. at 31-32. The court's ruling on this particular issue also conflicts with established case law holding that regardless of how emotionally committed a foster or relative provider is to a child, on-going dependency is inherently temporary.⁴ *See* Department's

⁴ In another strawman argument, the father erroneously claims that the Department cited outdated case law interpreting an old version of the statute to argue that a guardianship is inherently temporary. Father's Brf. at 36. But the Department has not argued that guardianships are inherently temporary, and the issues in this case have nothing to do with whether guardianships in *general* qualify as permanent plans. The issue in this case is whether guardianship is a viable option for consideration in this case, when there is no guardianship petition pending, and no agreement for a guardianship by either the father or the relatives, and all the evidence established that adoption is in the best interest of these children. Contrary to the father's assertions, *A.V.D.* and *K.S.C.* remain good law for all of the propositions cited by the Department in its opening brief.

opening brief at 29-32. It also conflicts with state and federal law requiring that permanency for children be provided quickly and in most cases no later than fifteen months after placement. See Department's opening brf. at 34-36. It is also internally inconsistent with the court's other findings that "all three children are in need of a permanent home, given the instability they have faced in their biological home and the length of time they have spent in out-of-home care. Unchallenged Finding of Fact 1.25.

Finally, the court committed obvious or probable error in denying termination solely to facilitate visitation. That ruling is not supported by substantial evidence and conflicts with case law establishing that positive visitation with a parent, in and of itself, is not a sufficient basis to deny termination. *In re the Dependency of A.V.D.*, 62 Wn. App. 562, 815 P.2d 277 (1991)(evidence supported termination notwithstanding finding that continued contact was in the child's best interest). Regardless of how positive the father behaved during his few hours of supervised visitation, the overwhelming evidence established that termination was still necessary to protect the children's best interest. 6RP 688, 690, 7RP 869-70, 891, 892. All of the children had been in care more than two years, and the two youngest had been in care most of their young life. See Department's opening brief at 29-32, and 33-36. The father had been

given years to correct his parental deficiencies and had been warned as early as 2007 that the court approved a permanent plan of adoption. He made no meaningful changes in his life despite every opportunity to do so, he filed no alternative action, and at the time of trial, he had still not progressed to the point of having even unsupervised visitation. The evidence established, and the court found that all the children need permanent homes given the instability they faced in their biological home, and the length of time they have spent in placement. Unchallenged Finding of Fact 1.25. All three children were adoptable and had prospects for adoption. *Id.* Under these circumstances, termination was the only result that would serve the children's best interest. *In re Gillespie*, 14 Wn. App. 512, 543 P.2d 249 (1975) (if the parent has not acted responsibly toward the child, it is not in the child's best interest to be in the parent's custody). Particularly since the undisputed evidence indicated that the relatives were likely to continue to allow the father to visit even after his parental rights were terminated. 7RP 869.

Although the father complains that the state's approach is "all-or-nothing, terminate or return" and is motivated by fiscal concerns that do not take into consideration how alternative plans might be more appropriate than termination, he fails to cite even one reference to the record supporting his claims. Father's Brf. at 34-35. Not one witness or

exhibit suggests that the state's actions in this case were motivated by fiscal interests, and at no point in the trial did the father advocate for any alternative other than return home. The father could have legitimately expanded the court's consideration of a guardianship or some other alternative by simply filing such an action and consolidating it with the termination if he sincerely believed this was appropriate. RCW 13.34.230 (permits any party to file a guardianship petition). And while he may now tout the benefits of a theoretical guardianship, he has yet to file such an action even though he has had ample opportunity to do so. The father has only himself to blame for the limited scope of the trial court's authority in this case.

In addition to committing a myriad of obvious or probable errors, the court's ruling also renders further proceedings useless, and substantially limits the freedom of the parties to act. RAP 2.3(b)(1) and (2). *See* Department's opening brf. at 41-43. Given the court's finding that all services capable of correcting the father's parental deficiencies were already provided, and its finding that there is little likelihood that this father will correct his deficiencies, there is little that can be accomplished in the pending dependency action other than requiring a repetition of services the court has already found are unlikely to remedy the father's deficiencies. The court's order does not authorize or even approve the

children returning to the father, but the denial of termination prevents them from being fully integrated into the relative's home. Most concerning is the undisputed fact that the court's order to deny termination has further inflamed the tensions within the extended family and might result in these children being displaced again. A new termination action will not prevent the same errors from recurring, and it will not cure the harm caused by an unnecessary delay in obtaining a permanent home that these children have already suffered.

2. This court should alternatively accept review pursuant to RAP 2.3(b)(3).

Even if this court declines to accept review under RAP 2.3(b)(1) or (2), it should accept review under RAP 2.3(b)(3) because the ruling below so far departed from the accepted and usual course of judicial proceedings as to call for review. As indicated in its opening brief and in this reply, all parties, including the Department are entitled to notice and an opportunity to be heard. RCW 13.34.090. The Department should be able to rely on existing case law and not present evidence of alternatives to termination, when no one in the proceeding has initiated a guardianship or third party custody or other alternative action. If the court is "permitted" to consider alternatives, and deny termination because it considers a theoretical alternative possible, then the Department should be given notice and have

an opportunity to present evidence on that issue before the court makes its ruling. Moreover, the trial court's expectation that relative care providers be called in termination cases to testify about their willingness to agree to something short of adoption is such a far departure from the usual and accepted practice, and is such a deeply concerning departure from the usual practice that review is urgently called for by this court. *See* Department's opening brf. 41-43, and see *supra* at 17-19.

C. The father's assertion that the CR 60 motion was an attempt to get a 'second bite at the apple' erroneously presumes that the Department had a legal obligation to present evidence of alternatives in the first place.

The father concedes that mistakes of fact, which are extraneous to the proceeding, justify the court in vacating an erroneous ruling as does irregularity or surprise in obtaining an order. Father's Brf. at 20-21. That is exactly what happened here. Although there was no guardianship, third party custody, or other alternative action before the court, and no party advocating for any alternative to termination, the court nonetheless assumed that one of these theoretical alternatives was possible, and assumed that both the father and the relatives would go along with one of these alternatives, and denied termination on that sole basis without giving either the Department or the CASA the opportunity to rebut these assumptions. 8RP 4-8. These were assumptions about facts that were

clearly extraneous to the proceeding, and as the CR 60 motion established, all of the court's assumptions about these extraneous facts were incorrect. CP 343- 50. Neither the father nor the relatives had any desire for an alternative other than return home or adoption. The father made clear he would undermine any alternative that might be ordered; he had no intention of cooperating with the relatives, and in fact proposed sending his children out-of-state to live with other relatives. He had no concern over the effect this would have on his children, his family relationships, or his visitation – even though visitation with his children was what the court thought was so important that it had to deny termination. *Id.* On review, the question for this court is whether any rational person who is charged with the responsibility for ensuring timely permanency for children would ignore this compelling evidence and refuse to even require a response by the father so that it might meaningfully consider whether its original findings were based on mistakes of fact. The answer to that should be clear.⁵

⁵ In another strawman argument, the father claims that the Department insists it had a right to present testimony on the CR 60 motion. Father's Brf. at 22. That is incorrect. Rather, the Department takes issue with the court's denial of the CR 60 motion without requiring even a written response by the father. CR 60(e)(2) provides that upon the filing of the motion, the court "shall" enter an order setting a hearing and directing a response. Use of the term "shall" in this rule creates a mandatory duty, and even if the court is permitted some discretion in these matters, the court abused its discretion in not requiring some response by the father. It wrongly allowed the father to defend on appeal the court's ruling that alternatives are available while simultaneously refusing to commit or agree to any of those supposed alternatives.

By arguing that the CR 60 motion is an attempt to get a 'second bite at the apple' the father makes the same mistake the trial court does — he faults the Department for failing to present evidence it had no legal obligation to present in the first place. *See supra* at 13-17. Contrary to the father's assertion, the failure in this case was not inadequate evidence to support termination, but rather the court's reliance on faulty assumptions and mistakes of fact about matters that were not part of the record in the case. The CR 60 motion would have allowed the court to correct the mistakes of fact and irregularities in the proceeding it created and in the interest of these children, the court below should have at least entertained the motion.

Finally, the father argues that the appeal of the CR 60 ruling is a frivolous end-run around the state's inability to appeal the termination petition and he cites a number of cases in which individuals filed motions to vacate after the time expired to file an appeal and then attempted to collaterally attack the underlying judgment. Father's Brf. at 25. But both the Department and the CASA timely appealed the underlying termination order and the merits of that ruling are properly before this court for consideration, so there was no need

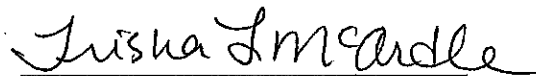
for Department to appeal the CR 60 ruling to buy time, or allow it to "bootstrap" a challenge to the underlying order.

III. CONCLUSION

For all of the foregoing reasons, the court should reverse the orders entered in this case and terminate the father's parental rights.

Dated this 28th day of October, 2009.

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A handwritten signature in cursive script, reading "Trisha McCardle".

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